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SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 72-1656

PAUL A. TENNENBAUM, et al.,

Petitioners,

vs.

ABRAHAM M. TENNENBAUM, et al.,

Respondents.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PAUL M. SCHINDLER
Attorney for Respondents
1700 Central Trust Tower
Cincinnati, Ohio 45202
(513) 381-4188

Of Counsel:

MELVIN J. KESSEL
Paxton & Seasongood
1700 Central Trust Tower
Cincinnati, Ohio 45202
(513) 381-4188

LEONARD L. LIPSCHUTZ
1013 Main Street
Cincinnati, Ohio 45202
(513) 421-2922

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED

I. Is the right to trial by jury guaranteed where it did not exist prior to the adoption of the Ohio Constitution? iii

II. Is the right to trial by jury properly raised in an appeal from a dismissal for want of jurisdiction by the Court of Common Pleas, where right to trial by jury is available in Probate Court? iii

III. Is the Seventh Amendment to the Constitution of the United States applicable to civil suits in State Courts? iii

REASONS TO DENY WRIT 1

SUMMARY 4

TABLE OF CASES

Belding v. State ex rel. Heifner, 121 Ohio St. 393, 169 N.E. 301 2

Brown, Executor, etc. v. Reed, 56 Ohio St. 264, 46 N.E. 982 1

Gustafson v. Peck, 216 F. Supp. 370 (N.D. Iowa 1963) 3

Iacaponi v. New Amsterdam Casualty Co., 258 F. Supp. 880 (W.D. Pa. 1966) 3

Melancon v. McKeithen, 345 F. Supp. 1025 (E.D. La. 1972) 4

Taylor v. Brown, 92 O.S. 287, 110 N.E. 738 2

TABLE OF OTHER AUTHORITIES

Ohio Revised Code, Section 2101.31 3

QUESTIONS PRESENTED

I. IS THE RIGHT TO TRIAL BY JURY GUARANTEED WHERE IT DID NOT EXIST PRIOR TO THE ADOPTION OF THE OHIO CONSTITUTION?

II. IS THE RIGHT TO TRIAL BY JURY PROPERLY RAISED IN AN APPEAL FROM A DISMISSAL FOR WANT OF JURISDICTION BY THE COURT OF COMMON PLEAS, WHERE RIGHT TO TRIAL BY JURY IS AVAILABLE IN PROBATE COURT?

III. IS THE SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES APPLICABLE TO CIVIL SUITS IN STATE COURTS?

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REASONS TO DENY WRIT

Right to Jury Trial in Ohio at Common Law

In the case of *Brown, Executor, etc.* v. *Reed*, 56 Ohio St. 264, 46 N.E. 982, the question of the right to trial by jury was raised in the Huron County Probate Court in connection with exceptions to an executor's account alleging that the executor failed to sell assets of the estate for a sufficient amount and to charge him for the difference between what he sold it for and its true value.

The Supreme Court stated in the *Brown* case, 56 Ohio St. at Page 270:

> "It is said that the circuit court erred because of the summary determination of a question of the character of this on exception to the executor's account

> denies his constitutional right to the intervention of a jury. But the constitution preserves the right to trial by jury in those cases only where it existed previously to its adoption. Both before and since the adoption of the constitution it has been usual to call executors and other trustees to account in courts having equity or probate jurisdiction, and without the intervention of a jury to determine any question affecting the state of their accounts.
>
> The eighth section of the fourth article of the constitution ordains that 'the probate court shall have jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlements of the accounts of executors, administrators, etc. It is expressly provided in section 6400 of the Revised Statutes that 'all questions, except those arising in criminal actions and proceedings, unless otherwise provided by law, shall be determined by the probate judge, unless, in his discretion, he shall order the same to be tried by a jury or referred.' "

Therefore, it is clear that there is no constitutional right to trial by jury under the Ohio Constitution in this type of case.

As stated in *Belding* v. *State ex rel Heifner,* 121 Ohio St. 393, 169 N.E. 301:

> "1. Section 5 of Article I of the Constitution of Ohio only guarantees the right of trial by jury in those cases where it existed prior to its adoption."

The case of *Taylor* v. *Brown,* 92 O.S. 287, 110 N.E. 738, cited at page 18 of Petitioners' brief, was not a case involving fiduciary appointment by the Probate Court and was a suit between partners where several partners sued for damages for fraud and deceit against another partner who held title to certain land in trust for the partnership. That case is not in point on the question of the right to

jury trial in a case involving the actions of a fiduciary appointed by the Probate Court, with respect to his duties as fiduciary.

Procedural Question On Appeal

The Ohio Constitution provides for a Probate Division and the Legislature may determine the exclusive jurisdiction of that Division. The Probate Court has the right to grant a trial by jury (Section 2101.31, Ohio Revised Code).

Until petitioners have been denied trial by jury in Probate Court, they have not been deprived.

It is submitted that the Probate Court is the proper place to raise this issue, and it can be raised in the case now pending filed by Petitioners against Respondents in the Hamilton County, Ohio, Probate Court.

Applicability of Seventh Amendment

In *Gustafson* v. *Peck,* 216 F. Supp. 370 (N.D. Iowa 1963), which held that federal courts have exclusive jurisdiction of actions under the Tort Claims Act, plaintiffs had argued improper denial of jury trial. The court stated, at page 371, that the Seventh "does not operate to guarantee a right to a jury trial in the State Court but applies only to the Courts of the United States."

Iacaponi v. *New Amsterdam Casualty Co.,* 258 F. Supp. 880 (W.D. Pa. 1966), affirmed 379 F. 2d 311, cert. denied 389 U.S. 1054, allegedly involved fraud in connection with a workman's compensation agreement. Among other things, plaintiff claimed that he was denied due process by technical Pennsylvania procedural rules (regarding res judicata) and that he was denied trial by jury. The court declared in 258 F. Supp. at page 884:

> "A litigant in a state court civil action has no constitutional right to a trial by jury under the Seventh Amendment or under the due process clause of the Fourteenth Amendment.
>
> A State may establish its own procedures and practices with regard to the conduct of civil litigation including the right of trial by jury."

The argument, rejected in *Iacaponi,* that procedural rules served to violate plaintiff's due process rights is similar to Petitioner's "statutory scheme" argument (Brief for Petitioner, Question I. and III., pp. 2-3).

In *Melancon* v. *McKeithen,* 345 F. Supp. 1025 (E.D. La. 1972), Affirmed 93 S.C. 289-90, plaintiffs specifically sought a holding that the Seventh Amendment applies to civil actions in state courts through the Fourteenth Amendment. In a comprehensive opinion, taking full note of the Supreme Court's responsiveness to evolving standards of due process, the District Court held in 345 F. Supp at page 1027 that the Seventh is not applicable to state courts stating jury trials in civil cases "are not so fundamental to the American system of justice as to be required of state courts by due process."

SUMMARY

There is no constitutional right to a jury trial under the Ohio Constitution since right to trial by jury in a suit against an executor or testamentary trustee for violation of his duties did not exist at common law.

Even if such right does exist, it can be granted in the Probate Court which has the right to grant same and has not yet been denied. Therefore, the appeal is premature.

Moreover, the Seventh Amendment right to trial by jury does not apply to civil actions in State Courts.

Therefore the writ should be denied.

Respectfully submitted,

PAUL M. SCHINDLER
Attorney for Respondents
1700 Central Trust Tower
Cincinnati, Ohio 45202
(513) 381-4188

Of Counsel:

MELVIN J. KESSEL
Paxton & Seasongood
1700 Central Trust Tower
Cincinnati, Ohio 45202
(513) 381-4188

LEONARD L. LIPSCHUTZ
1013 Main Street
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